

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
CLAUDE RATHBURN)	DOCKET NO. 81-79

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On November 30, 1981, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Claude Rathburn ("Grievant"). Grievant alleged the performance evaluation he received for the period July 30, 1980 to July 30, 1981 violated Article XIII and Article 13 of the applicable collective bargaining agreements in that three of the ratings Grievant received in various factors and the comments relating to those ratings adversely affected Grievant's rating and the purported deficiencies referred to were not called to Grievant's attention during the rating period.

A hearing was held before the full Board May 27, 1982, at the Board hearing room in Montpelier. Assistant Attorney General Marilyn Skoglund represented the State of Vermont ("State"). VSEA was represented by its attorney, Michael R. Zimmerman. Briefs were filed by the State and VSEA on June 8 and 11, 1982, respectively.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent-status employee, as that term is used in the Agreement between the State and VSEA, effective for the periods July 1, 1979 and June 30, 1981, and July 1, 1981 to June 30, 1982 (hereinafter referred to collectively as "the contract").

As such permanent-status employee, Grievant was entitled to all rights afforded such employees by statute, by the Rules and Regulations of Personnel Administration, and by the contract.

2. From 1974 to the present, Grievant has been employed by the Department of Mental Health, at the Vermont State Hospital in Waterbury, Vermont. At all times relevant herein, his position title has been Psychiatric Technician B, a Pay Scale 9 position.

3. A performance evaluation was done on Grievant for the period July 30, 1980 to July 30, 1981. That is the rating period relevant to this grievance, and is hereinafter referred to as "rating period".

4. During the rating period Grievant's duties were that of a "floating charge". A "charge" is an employee who oversees the work of other non-medical employees on a particular ward during a particular shift (i.e. psychiatric technicians, aides, trainees). The term "floating charge" meant Grievant took over the duties of a ward "charge" when the employee who normally performed those duties was unavailable. Grievant served as a "floating charge" in the four geriatric wards of the hospital.

5. During the same period, Grievant's normal shift was from 2:30 p.m. to 11:00 p.m., and his immediate supervisor was Alice Cook, Nursing Service Supervisor. However, because Cook's normal shift during that period was from 8:00 a.m. to 4:00 p.m., Grievant was also supervised by the three afternoon Direct Care Supervisors: Catherine Marshall, Rosemary Dunn, and Joe McKenzie.

6. On August 11, 1980, Grievant, who was coming on duty as afternoon ward "charge" toured the ward with the "charge" who was going off duty (called "tripping" in hospital jargon). Grievant noticed the morning

shift personnel had not put away the clean linen for the ward. Evidently, the out-going "charge" asked Rosemary Dunn, who was Grievant's supervisor for that afternoon shift, if she would have the afternoon shift put away the linen. When Dunn mentioned that request to Grievant, he told Dunn he considered it the morning shift's responsibility. Nonetheless, Grievant and the afternoon shift employees did put away the linen. Dunn did not tell Grievant that his comments were inappropriate, or that he should try and develop good working relationships with other employees. Instead, she made a written record of the incident on a "Record of Supervisor's Discussion with Employee" form, which Grievant did not see until his Step I grievance meeting herein (Grievant's Exhibit 2, Page 1).

7. "Record of Supervisor's Discussion with Employee" forms are kept by supervisors on individual employees, and are not required, and are not shown, to an employee or placed in their personnel file. They are used to "jog" a supervisor's memory on an employee, and are referred to when a supervisor is involved in a performance evaluation of an employee. Typically, negative actions, not meritorious ones, are recorded on the form.

8. On October 1, 1980, Grievant's direct supervisor was again Rosemary Dunn. At about 5:00 p.m. Grievant asked Dunn whether a patient, who was constipated, should have medication to facilitate a bowel movement. Dunn reminded Grievant the patient had recently had a large dosage of medication. Dunn suggested to Grievant his memory was suffering because of the number of overtime hours he had been working. Grievant told Dunn it was none of her business if he chose to work overtime. Later, he telephoned Alice Cook, who was at home, to complain about Dunn, saying she intimidated him and he did not wish to work with her again. Cook told Grievant Dunn was

not "that type" and he would have to learn to work with her. The next day Cook, Dunn, and Grievant met to discuss the incident. Dunn recorded her version of the incident on a "Record of Supervisor's Discussion with Employee" form, which Grievant saw for the first time at his Step I grievance meeting herein (Grievant's Exhibit 2, Pages 2 and 3).

9. Catherine Marshall was Grievant's supervisor on May 4, 1981, when an incident occurred involving Grievant, Marshall and a hospital aide, Tammy Lowell, who was subordinate to Grievant. Marshall had asked Lowell to make sure Grievant was aware that certain patients, because of the medication they were on, had to have their vital signs taken. When Lowell informed Grievant of the situation, he flew into a rage, yelled at Lowell, saying that he was tired of her "bossing" him around all day. Grievant then rushed, enraged, to the room Marshall was in, administering to a patient. Grievant told Marshall he was tired of Lowell "bossing" him around.

10. Marshall, concerned about Grievant's actions upsetting the patient, took Grievant out of the room and brought him to the nurses' station. Marshall then told Grievant his behavior was inappropriate and Lowell was not "bossing" him around.

11. After the incident, Marshall, Lowell, and Helen Sargent (who witnessed the incident) reduced their versions of the incident to writing on "Record of Supervisor's Discussion with Employee" forms, which Grievant saw for the first time at his Step I grievance meeting herein (Grievant's Exhibit 2, Pages 4 through 6).

12. On June 17, 1981, Grievant's supervisor was Joe McKenzie. One of Grievant's tasks that day was to keep track of the amount of food one of the patients consumed. At suppertime, in the patients' dining room,

someone (it is not clear who) cleared away the patient's food tray before Grievant had a chance to make note of what food he had consumed. Grievant became upset, and began yelling, "who took that fucking tray away", or words to that effect. This yelling was directed at McKenzie, employee Millie Corliss, and several new hospital aides in the presence of the patients eating dinner at the time. McKenzie immediately informed Grievant his actions were uncalled for and that in the future he would not tolerate such foul language on his ward. After the incident passed, McKenzie did not talk to Grievant further about the incident.

13. Corliss and McKenzie recorded the incident on "Record of Supervisor's Discussion with Employee" forms which Grievant saw for the first time at his Step I grievance meeting (Grievant's Exhibit 2, Pages 8 and 9).

14. During the rating period, Grievant complained to Alice Cook many times of his difficulties in working with others, and other employees complained to Cook on numerous occasions of their difficulties in working with Grievant. Cook and Grievant had many discussions during the period about his relationships with co-workers, during which Cook told Grievant he had to work at improving his relationships with other employees. She attempted to offer suggestions to Grievant on how to improve working relationships with others, but found it difficult because Grievant did not accept criticism well. He would often interrupt her and not allow her to get her point across.

15. Sometime in June, 1981, Cook met with Marshall, McKenzie, and Dunn to discuss Grievant's performance during the rating period for the purpose of preparing his annual evaluation. Cook then prepared the evaluation.

16. On July 27, 1981, Grievant received his performance evaluation covering the rating period, July 30, 1980 to July 30, 1981. Grievant was given an overall rating of "3" (consistently meets job requirements/standards). In all but three of the individual "factors", Grievant received ratings of "3" and "4" (frequently exceeds job requirements/standards). Grievant received "2" (inconsistently meets job requirements/standards) ratings in the following three factors: Factor 6 (Relationship With Co-Workers), Factor 7 (Relationship With Supervisors), Factor 14 (Supervisory Skills). In the comments section, the following comments appear as justification for the "2" rating in Factors 6 and 14:

Unable to develop good working relationship with most other employees.

In the comments section, the following comment appears as justification for the "2" rating in Factor 7:

Should develop a positive attitude with Direct
Care Supervisors
(Grievant's Exhibit #1)

MAJORITY OPINION

At issue here is whether the State violated the following language of Article XIII and 13 of the applicable contracts, which language is the same in both contracts:

During the rating year, immediate supervisors shall call the employee's attention to work deficiencies which may adversely affect a rating (Grievant's Exhibits 7, 8).

Grievant alleges the performance evaluation he received for the July 30, 1980-July 30, 1981, rating period violated this language.

Grievant received "2" (inconsistently meets job requirements/standards) ratings in the factors of Relationship With Co-Workers and Supervisory Skills, and the following comments appear as justification for those ratings:

Unable to develop good working relationship
with most other employees.

He also received a "2" rating in "Relationship With Supervisors",
with the following comment appearing as justification for it: .

Should develop a positive attitude with
Direct Care Supervisors.

Grievant alleges these individual "2" ratings and supporting comments
adversely affected his rating and the purported work deficiencies were not
called to his attention during the rating period.

In our view, it is clear these individual ratings and comments adversely
affected Grievant's performance rating. Any work deficiencies noted on
an annual performance evaluation adversely affect a rating since their
presence could conceivably hinder an employee's opportunities for promotion,
transfer, or employment outside State government. Grievance of Martha Ewell,
5 VLRB 166 (1982). Here, obvious work deficiencies of Grievant are noted;
namely, poor working relationships with other employees.

Our next task is to determine whether the deficiencies were called to
Grievant's attention during the rating year.

With regard to the factors "Relationship With Co-workers" and "Supervisory
Skills", and the accompanying comment "unable to develop good working relationship
with most other employees", we conclude the employer met its contractual
responsibility. Grievant and his supervisor, Alice Cook, had many discussions
during the period about his relationship with co-workers. Cook told Grievant
he had to work at improving such relationships, and offered suggestions
along those lines. Another of Grievant's supervisors, Catherine Marshall,
admonished him for inappropriate behavior when he flew into a rage at a
subordinate, accusing her of "bossing" him around. When Grievant was

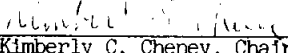
involved in a further incident; swearing and yelling directed at other employees in the patients' dining room, supervisor Joe McKenzie told Grievant his actions were uncalled for and that he would not tolerate such foul language on his ward.

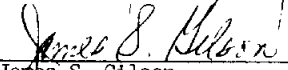
Grievant argues the supervisors' actions in the "bossy" incident and the dining room incident, in particular, fall far short of the duty of a supervisor to discuss with an employee, after the passage of a sufficient cooling-off period, exactly what conduct does not meet the supervisors' expectations.

Although we think it would improve labor-management relations, we do not believe the contract implies a "cooling-off" period, but simply provides an employee be told when his/her work behavior or performance is unacceptable so there will be no "surprises" at evaluation time. Here, Grievant's supervisors placed him on clear notice his relationship with other workers was unacceptable and needed improvement. Indeed, they informed him of deficiencies as soon as they arose.

We also conclude Grievant's deficiencies regarding relationships with supervisors were called to his attention during the rating period. Subsequent to an incident between Grievant and his supervisor, Rosemary Dunn, Grievant told Alice Cook that Dunn intimidated him and he did not wish to work with her again. Cook told Grievant that Dunn was not "that type" and he would have to learn to work with her. This represents notice to Grievant his relationship with his supervisor could be improved. Also, we assume when Cook told Grievant on frequent occasions he had to work at improving his relationships with other employees, this advice included his relationship with supervisors.

Accordingly, we find no contract violation by the employer in its annual performance evaluation of Grievant.


Kimberly C. Cheney, Chairman


James S. Gilson

CONCURRING OPINION

I concur with my colleagues' analysis and conclusion finding no contract violation by the employer in its annual performance evaluation of Grievant, and agree this grievance should be dismissed. However, I would like to express my grave concern with the way Grievant's supervisors used "Record of Supervisor's Discussion with Employee" forms. The forms were completed to record incidents Grievant was involved in during the rating period, and were placed in the supervisor's private file without being shown to Grievant. Although this private usage constitutes no contract violation, I believe it is disruptive to relations between an employee and his/her supervisor. I can understand the need for a supervisor to use the form as a reference tool for performance evaluations to jog his/her memory of an employee. Still, I believe that if the form is to be used, it would be preferable that a copy of the completed form be given the employee so the incident can be grieved and resolved at the time it occurs.


William G. Kemsley, Sr.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of Claude Rathburn is DISMISSED.

Dated this 30th day of July, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemmley, Sr.

James S. Gilson